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Supreme Court of the United States

October Term, 1951

No. 508

ALBO TRADING CORPORATION,

v.

THE UNITED STATES

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The requisition of the property in this case was authorized by the Act of October 16, 1941. (Appendix to the Petition for Writ, page 9.) The property requisitioned (Albo Plaintiff's Exhibit 10) covered

> "All machine guns, operating, non-operating or obsolete, and all parts therefor, and all cannon, grenades, bombs, or other military arms using explosives (other than pistols, rifles and shotguns) and ammunition for any of the foregoing (other than ammunition for pistols, rifles and shotguns)."

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This requisition clearly indicated, on November 16, 1942, the need on the part of the Respondent, for the articles listed in the requisition was immediate and pressing and such as will not admit of delay. Notwithstanding the allegation in the requisition, there had been no prior negotiations of any kind for obtaining the use of such property for the defense of the United States. It is to be noted that in the instant case the materials requisitioned were listed as above, whereas in the case of *Williams* v. *United States,* 111 Ct. Cl., 356 and *Shaffer* v. *United States,* 104 Ct. Cl. 229, where the Government was requisitioning old automobiles under the same act, the material requisitioned was designated as "scrap".

The present case differs from the *Van Karner Chemical Arms Corporation* v. *the United States,* 109 Ct. Cl. 425 and the *International Aircraft Trading Company* v. *United States,* 109 Ct. Cl. 435, cases in these major respects.

1. All of petitioner's sales were made "as is" and "where is", the same as when these goods had been originally purchased by it.

2. Petitioner never sold or offered to sell a completed gun in operable condition.

3. Petitioner never sold any of its guns, or parts therefor, to the Respondent or any of its agencies, or to any Allies.

4. Petitioner's sales, aside from the residual market as souvenirs, were made to licensed arms dealers and manufacturers, who reconditioned the guns as they saw fit. (Albo Paley 363-367, Pltf. Ex. 15).

5. Respondent has admitted that Petitioner had a contract in force, on the date of requisitioning, November 16, 1942, covering the sale of the requisitioned guns at the unit price of $50.00 each.

6. Respondent never offered to sell Petitioner or its customers any of the Browning guns or the Navy lot of Lewis & Marlin guns.

For all these reasons, Petitioner was not bound by any standards or specifications set by the U. S. Army or other Governmental agencies. The term, "obsolete", the quantities of the more modern Browning gun which were available and the production rates therefor had no effect upon Petitioner's sale and are clearly not applicable to to this case.

Respondent admits the sale of the Petitioner's guns up to and including October 15, 1942, at $50.00 each. Respondent, however, ignores the testimony relating to the guns Ettlinger sold to R. F. Sedgley, Inc., as did the Court of Claims in its findings. The Petitioner's sales and the Ettlinger sales established that there was a market for the guns up to the time of the requisition and these sales are determinative of the amount of just compensation that the Petitioner is to receive for the property requisitioned. The Respondent is bound by the market price of the materials requisitioned, that being the established price that was paid for the materials up to the time of the taking. The Respondent cannot determine the value of the property taken by the use that it subsequently made of the property taken.

Petitioner's market was only effected by the acts of the Respondent herein, namely, the requisition of November 16, 1942, and the Limitation Order L-230 of the same date. If Petitioner's property had not been requisitioned and merely subjected to Limitation Order L-230, as was applied to the Schenectady lot of tripods in the Volk case, Petitioner could have sold his guns and parts therefor after the Limitation Order L-230 was revoked.

Respondent, on page 11 of the brief, quotes from the opinion of the Court in the Van Karner Chemical Arms Corporation case, (109 Ct. Cl. 433-434):

> "• • • Had the defendant not requisitioned the guns, we have serious doubt that the plaintiff could have disposed of them at all, at least not until the next war."

That is merely a surmise on the part of the Court. Sagor, a duly licensed arms dealer, testified that he was ready, willing and able to take over all of the Petitioner's guns and parts at the prices set forth in the two Van Karner contracts, in the event that Van Karner Corporation did not exercise their options. All Petitioner's guns were requisitioned. Based upon Petitioner's knowledge and experience, it is firmly of the opinion that had they not been requisitioned, it could have held the guns and sold them after the revocation of the Limitation Order for the prices previously obtained for them.

In the companion Volk case, the Respondent requisitioned the machine gun tripods in New York City belonging to Volk, for which it offered him scrap prices. The major part of Volk's tripods, stored at Schenectady, N. Y., were not requisitioned but were "frozen" by the Limitation Order L-230. The fact is that, although not in evidence, Volk, upon the revocation of the Limitation Order, is now selling the tripods at Schenectady at reasonable prices for military use, even though there are no guns available to be sold with the tripods, as originally contemplated by the parties.

The Court's Finding 8 (R. 15) as to the meaning of the term "obsolete" is without any foundation. It is contradicted by the Court's Finding 10 (R. 16) in that as late as October 15, 1942, the United States Navy was negotiating with the Van Karner Chemical Arms Corporation for the purchase of 2500 of the reconditioned

Marlin guns for $266.00 each. This statement is accepted by the Respondent. The Navy Department had its representative on the Munitions Assignment Committee. It is evident that the Navy Department, as late as October 15, 1942, did not know that the Marlin guns were "no longer suitable for the purpose" for which they had been originally intended, nor did it know that there was an adequate supply of Browning guns available to it at the time it was negotiating for the Marlin guns.

The conclusion of the Court as to the value of these guns is contrary to and disregards the pertinent facts which were duly proven, including the market or the sales price of the guns.

With respect to Petitioner's spare parts requisitioned by Respondent, the record shows that Respondent made no effort to determine the contents of the boxes taken or to evaluate same as required by the Act of October 16, 1941. Respondent's counsel admitted at the hearing that Ordnance personnel was unfamiliar with the contents thereof and therefor made no attempt to list the materials taken.

For this reason, Petitioner's evaluation of the spare parts for the requisitioned guns should be accepted in lieu of Respondent's unwarranted classification of all items taken as having scrap value only.

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CERTIORARI DENIED